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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1928.

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## No. 479

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**HUGH W. GRANT, Receiver of The Struthers Furnace Company,**

*Petitioner,*

*vs.*

**A. B. LEACH & COMPANY, INC.,**

*Respondent.*

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## STATEMENT.

---

MAY IT PLEASE THE COURT:

### WHAT THE CIRCUIT COURT OF APPEALS DECIDED.

The Circuit Court of Appeals merely held:

1. That in a simple suit by a trustee against a corporation to foreclose a trust deed securing bonds and covering only a part of the corporate property, a receiver could be appointed for only such property as was conveyed by the trust deed.

2. That such a receiver was a mere custodian of the property covered by the trust deed and was without title thereto—much less to the claims, if any, of the corporation, stockholders or creditors arising out of a contract for the purchase of all the bonds by another corporation for re-sale to investors.

3. That even though the court appointing him had, upon an *ex parte* application, directed that he bring suit against such other corporation he could not maintain such suit.

4. That the inability of Grant as receiver to maintain such suit was not cured by the facts that the same court in a stockholder's suit solely for the appointment of a receiver had appointed Grant receiver of all the corporate assets and directed him to institute such suit.[1]

It did not appear that there were any judgment creditors, or that the value of the property covered by the trust deed was insufficient to discharge the claims of all the bondholders. The corporate debtor had not been dissolved, neither had the court been asked to wind up its affairs. The foreclosure proceedings were predicated upon the validity of all the bonds, the deed of trust securing them, and the contract pursuant to which the bonds had been issued and sold and the deed of trust had been executed and delivered. Plaintiff in the *Baldwin* suit did not question the validity of either the contract, the trust deed, or the bonds.

Obviously, any suit against the original purchaser of the bonds would have to be instituted by some one who had a claim for redress. No such claim of either the corporate debtor or any stockholders, creditor, or other

1. This was in the *Baldwin* case (Tr. 254). As stated by the Circuit Court of Appeals:

"No claim was asserted against any one in the bill, and there was no averment of waste, mismanagement, or any wrongful act on the part of the corporation or directors, or that any of plaintiff's rights as a stockholder had been impaired or injured by any act of the company or its officers." (Tr. 271.)

Such a suit is unknown to the law.

person was covered by the trust deed. And none could be vested in the receiver by judicial fiat. The prosecution of any such suit would be not only foreign to the foreclosure suit, but antagonistic to it. So far as the Baldwin suit is concerned, it was a legal monstrosity. Juristically, it did not exist.

If the original purchaser of the bonds still held any of them, any equities between him and the corporation could be adjusted when he presented them for payment. If, on the other hand, the original purchaser had disposed of all the bonds, then the corporation, if so advised, might seek redress in an independent action. If stockholders had been wronged they had the usual means of redress. And why talk of the claims of other bondholders, when the record is barren of proof that they had sustained any injury, and when all their rights derive from the contract made by the debtor corporation with the original purchaser of the bonds, or of other creditors when the receiver's bill fails to show that there are any?

In other words, the Circuit Court of Appeals merely applied horn-book law to undisputed facts.

## ESSENTIAL FACTS NOT STATED BY PETITIONER.

It would seem that Counsel for petitioner have evolved a novel method for procuring a writ of certiorari. The method consists in making a fragmentary, inaccurate and misleading statement of facts, and then asserting that the writ should issue for *all* the reasons enumerated in paragraph (b) of section 5 of Rule 35, regardless of the total irrelevance of such abstractions to the facts contained in the record.

Petitioner's statement *is* misleading, because it is both

inaccurate and inadequate. It fails to inform this Court that in the District Court, Grant, as Receiver, omitted to adduce *any* proof in support of the averment that

> "this action is brought by this Receiver by virtue of authority so to do granted to him by the Court so appointing him as Receiver." (Tr. 2.)

It fails to inform this Court that the Circuit Court of Appeals intimated that the absence of such proof would require a reversal (Tr. 266) and that pursuant to the Court's suggestion the parties filed in the Circuit Court of Appeals certified copies of certain orders, petitions, etc., relating to the appointment of the receiver and his authority to sue, as well as a stipulation that such documents might be considered by the Court "in the determination of this cause." (Tr. 235, 271.)

It fails to inform this Court that pursuant to the request of the Circuit Court of Appeals both parties filed supplemental briefs addressed to

> "the question whether authority to bring this suit either was or could be conferred upon the receiver, and be rightly based upon the pleadings, in connection with the controlling statutes and equitable principles, and whether such authority would or would not be rightly incidental to and consistent with the nature and purposes of his possession of those assets which passed to the receiver." (Tr. 267.)

It fails to inform this Court that petitioner made no objection to either the consideration by the Circuit Court of Appeals of the certified documents above mentioned, or the power of such court to inquire into the authority of the State Court to authorize the receiver to sue Leach & Company. (See appendix, p. i, *infra.*)

It fails to inform this Court that Grant's bill sought relief solely as the representative of The Struthers Fur-

nace Company, and not as the representative of creditors or stockholders (Tr. 2-8). This is important because, as we shall hereafter see, it vitally affects the powers of Grant as Receiver.

Grant's bill failed to show, either:

1. The nature of the proceedings in which Grant was appointed receiver; or

2. That The Struthers Furnace Company was at any time insolvent; or

3. That said company had been dissolved; or

4. That there were any creditors, either simple-contract or judgment, prior or subsequent to the transaction complained of; or

5. That a condition or covenant of the trust deed securing the bonds had been broken; or

6. That any bonds were then outstanding and unpaid, or the maturities of said bonds; or

7. That the transaction complained of had rendered the said company insolvent; or

8. That any creditors or anyone else had sustained any injury or damage by reason of the transaction complained of; or

9. That any stockholder had been deceived or misled; or

10. That any stockholder had not known of the contract of April 15, 1922; or

11. That any stockholder, officer, director, or creditor (if any, either prior or subsequent), had ever taken steps to set aside the transaction complained of; or

12. That such transaction prevented or hindered the redemption of other preferred stock out of the redemption fund.

The transaction complained of was the purchase by Leach & Company of The Struthers Furnace Company

bonds of the par value of $1,500,000, (secured by trust deed), pursuant to a written contract that expressly provided for part payment in preferred stock of The Struthers Furnace Company. This stock which was redeemable at $105 was received by the said Company at $85. (Tr. 51-4.) Leach & Company paid for the bonds the said 3,000 shares of preferred stock at $85 and $1,122,250 in cash. More than three years afterwards Grant, as receiver, brought an anomalous proceeding which was for neither rescission, specific performance, or damages. He tendered back the stock, but *not the cash.* He asked that a *nunc pro tunc* contract requiring Leach & Company to pay *all* cash for the bonds be made —which the District Court proceeded to do! Accordingly on this 'judicial' contract a decree for $312,375 was entered against Leach & Company. (Tr. 214.)

Plaintiff's claim was predicated solely upon two grounds, viz.:

1. That holders of seventy-five per cent of the outstanding preferred stock had not assented to the execution and delivery of the bonds and trust deed, upon the hypothesis that the 3,000 shares then held and voted by Leach & Company could not lawfully be voted or counted, because Leach & Company had a special interest in the matter by reason of its previous option agreement to purchase the bonds.

2. That the preferred stock could be redeemed solely out of the redemption fund, and not otherwise.

In support of its contention that plaintiff sought relief solely as the representative of The Struthers Furnace Company, and not as the representative of stockholders or creditors, the defendant relied upon, *inter alia,* the following propositions:

1. The general rule, that the receiver stands in

the place of the corporation, and has no right of action where the corporation itself has none.

2. *That in order to avoid the application of the general rule, a receiver must plead facts which clearly show that necessity exists for recognition of the exceptions to it.* Only by this means can he bring himself within such exceptions. If the corporation or the juristic person, whose receiver he is, is *insolvent* he should allege the fact, and then allege other *facts* which show that the rights of creditors or stockholders have been infringed in such manner that he may maintain an action which could not have been maintained by such juristic person or corporation. *It must appear from his pleading that he represents creditors and stockholders; that their rights have been infringed, and that he seeks relief as their representative as well as the representative of the corporation, if it have any in the premises.*

1 Tardy's Smith on Receivers (2nd ed.), p. 909.

*Green* v. *Sprague Mfg. Co.*, 52 Conn. 330, 361.

14 a Corpus Juris, p. 990.

3. That plaintiff's bill failed to aver that there were any creditors, much less that any of their rights had been infringed. That creditors cannot complain of merely *ultra vires* acts in the absence of injury therefrom.

4. That unlike directors or officers, a stockholder as such sustains no fiduciary relation to either the corporation or other stockholders, but may, by vote or contract, pursue his own interest, even though it is opposed to that of the corporation.

5. That the statutory requirement of the assent of holders of three-fourths of the outstanding preferred stock to the issuance of bonds secured by mortgage was for the sole protection of stockholders, and that Grant, as receiver, could not enforce any such special rights.

*Westerlund* v. *Black Bear Mining Co.*, (C. C. A. 8th Cir.) 20 Fed. 599, 613.

6. That since the stockholders were not parties to the contract of April 15, 1922, any suit by them would of necessity be a derivative suit in the cor-

porate right, and that if, in such a suit, the corporation could not recover, the stockholders could not.

*Big Creek Gap Coal & Iron Co.* v. *American Loan & Trust Co.*, (C. C. A. 6th Cir.), 127 Fed. 625, 633.

*Collins* v. *Penn-Wyoming Copper Co.*, 203 Fed. 726, 729.

*Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 203.

7. That plaintiff's bill did not show:

(a) any changes in the personnel of the stockholders since the execution of the contract of April 15, 1922; or

(b) that any stockholders who failed to sign a proxy or written assent were stockholders when Grant filed his bill; or

(c) any facts which justified, excused, palliated or explained the failure of stockholders themselves to seek relief.

*McCampbell* v. *Fountain Head R. Co.* (Tenn.), 77 S. W. 1070.

*Dimpfell* v. *Ohio & Miss. Ry. Co.*, 110 U. S. 209.

*Collins* v. *Penn-Wyoming Copper Co.*, 203 Fed. 727.

*Union Trust Co.* v. *Illinois Midland Ry. Co.*, 117 U. S. 434, 468.

*Venner* v. *Atchison T. & S. F. R. Co.*, 28 Fed. 581, 589.

**GRANT'S POWERS AS RECEIVER UNDER THE OHIO STATUTES, ON THE DISTRICT COURT RECORD.**

Grant averred that he had been appointed receiver of all the property of The Struthers Furnace Company by the Common Pleas Court of Mahoning County in the case of *The Guardian Savings and Trust Company, Trus-*

*tee* v. *The Struthers Furnace Company,* in case No. 56103 (Tr. 2). There was no averment concerning either the *Baldwin* case, or the nature of the case in which Grant had been appointed receiver.

In paragraph 2 of his bill, Grant averred, among other things, that—

> "this action is brought by this Receiver by virtue of authority so to do granted to him by the Court so appointing him as Receiver." (Tr. 2.)

Defendant's amended answer contained the following paragraph:

> "2. This defendant admits the allegations in the second paragraph of said petition contained, *save and except the allegation therein made that this action is brought by said Receiver by virtue of authority so to do granted to him by the court of his appointment; that this defendant has no knowledge or information as to the authority granted to said Receiver to bring said action* and therefore neither admits nor denies said allegations of the petition *but requires said plaintiff to make strict proof thereof.*" (Tr. 19.)

Under Rule 30 of the Equity Rules, the foregoing paragraph was effective as a denial of plaintiff's averment that the court that appointed him had given him authority to institute the suit against Leach & Company.

*Brown* v. *Pierce,* 7 Wall. 205, 211-2.

The words "therefore neither admits nor denies the allegations of the petition" are clearly irrelevant surplusage. Irrelevant or redundant matter does not render a pleading defective.

31 Cyc. 76.

Plaintiff could not have been misled. He could not have believed that defendant had admitted the averment that plaintiff had been granted authority to bring suit.

As heretofore stated, plaintiff offered no proof whatever in the District Court concerning his authority to institute the suit against Leach & Company.

Since there was no proof with respect to the nature of the proceedings that had led to Grant's appointment as receiver, and no averment that The Struthers Furnace Company had been dissolved, or that it was insolvent; and since no special statutory powers were relied upon by Grant, but solely the authority of the Court that had appointed him receiver, the defendant asserted that Grant had failed to prove an essential averment of his bill, and that consequently it must be dismissed.

The defendant pointed out that sections 11938-78 of 2 Page's Annotated Ohio General Code (1926) provides for the filing of a petition by

> "a majority of the directors, trustees or other officers having the management of the concerns of a corporation or stockholders representing not less than one-third of the capital stock of a corporation"

for the winding up thereof. That this might be done when the corporation was *insolvent,* or when the objects of the corporation had wholly failed, and in other like cases. That the aforesaid sections of the Code provided that upon the granting of such a petition a decree should be entered *dissolving* the corporation and appointing a receiver.

The defendant admitted that section 11945 provided that *such* a receiver should be vested with all the estate, real or personal, of the corporation, and that he should have all the powers conferred by law upon trustees to whom assignments are made for the benefit of creditors. But, obviously, Grant had not been appointed receiver in *such* a case. The title of the cause in which he had

been appointed was sufficient proof of this, to say nothing of the absence of averment and proof concerning the nature of the proceedings that led to his appointment as receiver, Grant's failure to aver that The Struthers Furnace Company was insolvent, or that it had been dissolved, his non-reliance upon the powers granted by section 11945, his express reliance upon the order of the Court, etc.

The defendant asserted that in the absence of averment and proof it would have to be assumed that Grant had been appointed receiver pursuant to *some* sub-section of section 11894 of the Code, which relates to receiverships generally. (See appendix, p. ii, *infra.*) That the Court could not assume that Grant had been appointed pursuant to any *particular* sub-section, because of the absence of both appropriate averment and proof. That there had formerly been in force section 11960, which provided for the dissolution of, and the appointment of receivers for, *insolvent* mining or manufacturing corporations upon the petition of "stockholders owning one-fifth or more of the paid-up stock." That the procedure was the same as the procedure for the appointment of a receiver upon petition filed under section 11938, and that, of course, the powers of *such* receiver were the powers enumerated in section 11945. That section 11960, had been repealed by the Act of May 31, 1911 (102 Laws of Ohio, p. 512); and that since then there had been no "special statutes" providing for the appointment of receivers "when a corporation has been dissolved or is insolvent, or in imminent danger of insolvency" other than sections 11938-78 which had no relevancy to the case at bar.

*The point of the defendant's argument was, that there is a distinction in the laws of Ohio between the powers*

*of a receiver of a dissolved or an insolvent corporation and the powers of a receiver appointed pursuant to section* 11894.

It was also asserted that insolvency alone was not a sufficient ground for the appointment of a receiver, and that in the absence of an averment of the fact, the Court could not assume that plaintiff had been appointed receiver, because The Struthers Furnace Company was involvent.

That section 11896 provided that a receiver apceiver appointed pursuant to section 11894 should execute a bond

> "that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein."

That Grant's powers as receiver were defined by section 11897, which reads as follows:

> "SEC. 11897. POWERS OF RECEIVER. *Under the control of the court,* the receiver *may* bring and defend actions in his own name, as receiver, take and keep *possession* of the property, receive rents, *collect, compound for, and compromise demands, make transfers,* and generally do such acts respecting the property *as the court authorizes.*"

(Sections 11894-11898 date back to the Act of March 11, 1853, 51 Ohio Laws, pp. 97-9.)

That section 11897 was especially significant when read in conjunction with section 9064 (2 Page's Annotated Ohio General Code (1926)), which enumerates the powers of railroad receivers. (Appendix, p. ii, *infra.*) That receivers of railroads had been given the power to sue and to be sued without leave of court because otherwise such power did not exist.

That an ordinary receiver, such as Grant must be assumed to be, was, pursuant to section 11897, a mere ministerial officer without authority to do anything except what he was authorized to do by the court that appointed him. That he could no more bring actions in his own name in the absence of authorization by the court, than he could compromise demands, or make transfers of the property held by him as receiver.

*Cincinnati & Kentucky So. R. R. Co.* v. *Cincinnati, N. O. & Tex. Pac. Ry. Co.* 6 Ohio N. P. 427.

That, whereas, a receiver of a *dissolved* corporation was "vested with all the estate, real or personal of the corporation," and was "trustee of such estate for the benefit of the creditors of the corporation and its stockholders" and had "all the powers conferred by law upon trustees to whom assignments are made for the benefit of creditors," a receiver appointed under section 11894 had no such powers. That the latter was a mere *custodian* of property without title thereto—a hand of the court. That he could act only under the control of the court.

*Lafayette Bank* v. *Buckingham,* 12 Ohio St. 419, 425.

*Morley* v. *Cleveland Hippodrome Co.* 23 Ohio C. C. (N. S.) 295, 297.

1 Tardy's Smith on Receivers (2nd ed.) § 338, p. 845.

That as stated in 1 Tardy's Smith on Receivers (2nd ed.) p. 835:

> "To justify any of his acts the receiver must be able to point to some order of the court bestowing either expressly or impliedly the right to do the act."

That the averment that the Court that had appointed Grant receiver had authorized him to sue Leach & Company was an *essential* one that had to be proved.

*Rhodes* v. *Hilligass* (Ind.) 45 N. E. 666.
*Smead Foundry Co.* v. *Chesbrough,* 18 Ohio Cir. Ct. R. 783, 6 Ohio Cir. Ct. Dec. 670.
*Screven* v. *Clark,* 48 Ga. 41.
*Battle* v. *Davis,* 66 N. C. 252.
*Kennedy* v. *Gibson,* 8 Wall. 498.
*Barton* v. *Barbour,* 104 U. S. 126, 26 L. ed. 672.
*Pendleton* v. *Russell,* 144 U. S. 649, 36 L. ed. 574.
*Sterrett* v. *Second Nat. Bank* (C. C. A. 6th Cir.), 246 Fed. 753, affirmed, 248 U. S. 73.
4 Pomeroy's Equity Juris. §§ 1601, 1602, 1604, 1606, pp. 3778 *et seq.*

**STIPULATION AND DOCUMENTS FILED IN CIRCUIT COURT OF APPEALS, AND THE EFFECT THEREOF.**

As above stated, the Circuit Court of Appeals intimated that Grant's failure to prove an essential averment of his bill would necessitate a reversal. We think that the court rightfully refused to decide the case upon the record made in the District Court. Otherwise, the parties would have been subjected to more expense and further delay.

At any rate, the petitioner then made no objection whatever to the course that the Court suggested. On the contrary, he stipulated that the documents in question might be filed for the consideration of the Court. Moreover, he filed a supplemental brief addressed to the questions upon which the Court desired further argument. In no form, nor at any time, did he question the power of the Court either to consider the aforesaid documents or to decide the questions above referred to.

Of course, the petitioner is now estopped to make any such objections in this Court. Certiorari is not a means for procuring the judgment of this Court upon questions which were not presented to or passed upon by a Circuit Court of Appeals.

There were filed in the Circuit Court of Appeals the following documents, which were no part of the record made in the District Court:

(a) Plaintiff's petition in the case of *Louis S. Baldwin* v. *The Struthers Furnace Company and The Guardian Savings & Trust Company, Trustee,* filed on January 15, 1925, in the office of the Clerk of the Court of Common Pleas of Mahoning County, Ohio (Tr. 254).

(b) Plaintiff's petition in the case of *The Guardian Savings and Trust Company, Trustee, Cleveland, Ohio,* v. *The Struthers Furnace Company, Struthers, Ohio,* filed on January 15, 1925, in the office of the Clerk of the Court of Common Pleas of Mahoning County, Ohio (Tr. 237).

(c) Journal entry of said Court made on January 20, 1925, in the Baldwin case (1) appointing Hugh W. Grant receiver in both of the cases above mentioned (2) authorizing said receiver "to take possession" of all the property of The Struthers Furnace Company, and (3) directing that all pleadings, proceedings and entries filed, had or made in the Baldwin case "with reference to the action or conduct of said receiver" should be filed, had and made in the Guardian Savings and Trust Company case with the same effect that they would have if they had originally been filed, had, or made in such case (Tr. 259).

(d) A like journal entry made on January 22, 1925, in the Guardian Savings & Trust Company case (Tr. 251).

(e) *Ex parte* application of the aforesaid receiver in the Guardian Savings & Trust Company case to sue A. B. Leach & Company, Inc., in the District Court of the United States for the Northern

District of Ohio, Eastern Division, filed in the said Court of Common Pleas on July 30, 1925 (Tr. 262).

(f) Journal entry of the aforesaid Court of Common Pleas, made on July 30, *1925,* in the Guardian Savings & Trust Company case, directing the receiver to sue A. B. Leach & Company, Incorporated, in the District Court of the United States, Northern District of Ohio, Eastern Division,

> "in order to *reimburse the said receiver* for the apparent unlawful and illegal issuance of bonds *by said company* to A. B. Leach & Company on or about May 15, *1922 in payment for which* said A. B. Leach & Company sold, assigned, transferred and set over to said company" 3,000 shares of the preferred stock of The Struthers Furnace Company (Tr. 264).

Of course the stipulation that the aforesaid documents should be filed for the consideration of the Circuit Court of Appeals modified the record that had theretofore been made in the District Court, whether by means of pleadings, or proof, or failure to prove. Otherwise, the stipulation and the additional record would have been an idle ceremony. This is particularly true, in view of section 391 of the Judicial Code, which provides, in part, that—

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment *after an examination of the entire record before the court,* without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

It necessarily follows that defendant's admission in the District Court that plaintiff had been appointed receiver for all the property of defendant is irrelevant and immaterial in view of the stipulation and the other proceedings had in the Circuit Court of Appeals.

Let us now consider whether upon *the entire record before it,* the Circuit Court of Appeals rightly decided the issues presented by the parties.

## SUMMARY OF ARGUMENT.

I.

The State Court was without jurisdiction of the subject matter of the Baldwin suit which was brought by a stockholder solely for the appointment of a receiver.

II.

All that petitioner in the foreclosure suit showed, was that default had been made in the payment of interest and that the trust deed provided for the appointment of a receiver in such case. There was no showing that the mortgaged property was in danger of being lost, removed or materially injured, or that it was probably insufficient to discharge the mortgage debt, or that the defendant corporation had been dissolved, or that it was insolvent, or that it was in imminent danger of insolvency as required by section 11894 of the General Code.

It follows therefore that the appointment of Grant as receiver was contrary to statute and void.

III.

In simple foreclosure proceedings the power of a court to appoint a receiver is necessarily limited to the appointment of a receiver for the mortgaged property.

The alleged claim of The Struthers Furnace Company against Leach & Company under the contract of April 15, 1922, pursuant to which the bonds secured by the mortgage sought to be foreclosed were sold, necessarily was not a part of the mortgaged property.

The State Court was therefore without jurisdiction to direct the receiver to sue Leach & Company on the alleged claim.

IV.

The rights of neither creditors nor stockholders were involved or could be involved in the foreclosure suit; consequently the prosecution of any suit against Leach & Company is wholly foreign to, and inconsistent with not only the foreclosure suit, but the receiver's possession of the mortgaged assets. A receivership in foreclosure proceedings is entirely different from a receivership for winding-up a corporation, or in other suits which require liquidation of a corporation's assets.

V.

Grant was at most a mere custodian of certain corporate property. Section 11897 of the General Code does not vest him with title, and the order appointing him receiver did not even attempt to do so, but gave him possession only.

Since Grant was without title, the mere direction of the State Court that he bring suit against Leach & Company in a foreign jurisdiction conferred no authority in the premises.

The Federal Court in which the suit was brought was a foreign jurisdiction within the firmly settled rule above stated, and under the decisions of this Court, such court was without jurisdiction to entertain the aforesaid suit.

## ARGUMENT.

### I.

**The state court was without jurisdiction of the subject matter of the Baldwin suit, which was brought by a stockholder solely for the appointment of a receiver.**

No analysis of the petition in the Baldwin suit (Tr. 254) is necessary. The Circuit Court of Appeals has properly characterized it (p. 2, *supra*).

That the Court's decision was right, see:

1 Tardy's Smith on Receivers (2nd ed.) § 14, p. 51.

*Mann* v. *German-American Inv. Co.* (Nebr.), 97 N. W. 600.

*Gillespie* v. *Illinois Steel Co.*, 62 Ill. App. 594.

*Callaghan* v. *Consumers Ice, etc. Co.*, 13 Ohio Cir. Ct. 379, 7 Ohio Cir. Dec. 349.

*Cincinnati, etc. R. Co.* v. *Duckworth*, 2 Ohio Cir. Ct. 518, 1 Ohio Cir. Dec. 618.

*Gott* v. *Schultze Co.*, 12 O. N. P. (N. S.) 206, 21 O. D. (N. P.) 604, 56 Bull, 397.

*Bank* v. *Lakeside Co.*, 19 O. C. C. 365, 10 O. C. D. 542 (affirmed without opinion *Bank* v. *Lakeside Co.*, 667).

*Brown* v. *Hose Coupling Co.*, 18 O. C. C. (N. S.) 328, 33 O. C. D. 70.

*Valve Co.* v. *Williams*, 25 O. C. C. (N. S.) 497, 28 O. C. D. 338 (motion to certify record overruled, *Williams* v. *D. J. Williams Valve Co.*, 14 O. L. R. 210).

*Benson* v. *Insurance Co.*, 7 O. N. P. (N. S.), 113, 19 O. D. (N. P.) 17.

*DeLacroix* v. *Steel Co.*, 8 O. N. P. (N. S.), 489, 19 O. D. (N. P.) 767.

Mere temporary cessation of business is no ground for the appointment of a receiver.

*Murray* v. *Superior Court of Los Angeles County* (Cal.), 62 Pac. 191.

*Bartow Lumber Co.* v. *Enwright* (Ga.), 62 S. E. 233.

Particularly where, as here, Baldwin not only does not complain of such cessation, but affirmatively shows that it was justified by the condition of the pig iron industry.

There was no *action pending*—no controversy between Baldwin and the corporation. The petition stated no cause of action. The Court was wholly without jurisdiction of the subject matter and all that it did in said so-called suit was *coram non judice* and void.

15 Corpus Juris, p. 853.

Where there is an absence of jurisdiction, not even the consent of all parties in interest can confer it.

1 Tardy's Smith on Receivers (2nd ed.), p. 63.

Section 11894 (Appendix, p. ii, *infra*), clearly does not authorize the appointment of a receiver upon Baldwin's petition. Subsections 1, 2, 3, 4, and 6 need not even be discussed.

Subsection 5 is also inapplicable for the simple reason that a receiver may be appointed only "in *causes pending*" (See first paragraph of section 11894). There was no *cause pending* (Authorities, *supra*).

Furthermore, the phrase "In the cases provided in this title" obviously means *the cases covered by subsections* 1, 2, 3, 4, *and* 6, *where a corporation is concerned.* Insolvency or imminent danger of insolvency is not enough under the statute, just as either is not enough in the absence of statute.

14A Corpus Juris, p. 958.

Baldwin did not allege facts which showed that the corporation was insolvent. All that he showed was an insufficiency of quick assets,—inability to meet commercial obligations as they fell due in the course of business. That is not enough. "Insolvency * * * means that the property of the debtor, real or personal, estimated at a fair and reasonable value, is substantially less than his debts."

"A corporation's stock is not to be reckoned as a liability in determining its solvency."

*Hamilton* v. *Menominee Falls Quarry Co.* (Wis.), 81 N. W. 876, 880.

*Ratcliff* v. *Clendenin* (C. C. A. 8th Cir.), 232 Fed. 61, 66.

*Copper Belle Mining Co.* v. *Costello* (Ariz.), 95 Pac. 94, 98; 100 Pac. 807, 810.

*Tierney* v. *Butler* (Ia.), 123 N. W. 213, 214 (3rd finding).

*Richards* v. *Haliday,* 92 Fed. 798, 799.

*First Nat'l. Bank* v. *Rice,* 22 Ohio Cir. Ct. Rep. 183, 187.

Baldwin's petition contains no allegation with respect to the assets of the company. Its assets may have been worth several times the amount of its liabilities. The petition nowhere alleges that the assets are insufficient to pay corporate debts.

And as heretofore pointed out (p. 11, *supra*), the only "special statutes" that provide for the dissolution of a corporation are sections 11938-11978, which have not the remotest relevancy to this case. They provide for the filing of a petition by "a majority of the directors, trustees or other officers having management of the concerns of a corporation, or stockholders representing not less than one-third of the capital stock of a corporation" for the *winding up* thereof.

Furthermore, no person is entitled to the appointment of a receiver unless he has some interest in or claim to or lien upon the property in question. Of course a mere stockholder does not fall within that category. A corporation is the owner of its own property, and a stockholder as such has no interest in it, or lien upon it or claim to it. In order that he may have a receiver appointed he must show fraud, collusion, mismanagement, waste, internal controversies resulting in a deadlock that imperils the corporate assets, etc., etc.

It follows, therefore, that in determining the power of the receiver to sue, we must look solely to the foreclosure proceedings. This results from the fact that the court had no jurisdiction of the Baldwin suit. Of course, the attempted consolidation was a nullity. There was nothing to consolidate the foreclosure suit with. Juristically, the Baldwin suit did not exist. It is a self-evident proposition, that if a court is without jurisdiction of a suit, any action taken therein is void. There were not *two actions* pending in the same court. As a matter of fact, the two suits could not be consolidated, even if Baldwin's petition had stated a good cause of action.

Section 11369 of the General Code of Ohio reads as follows:

> "When two or more actions are pending in the same court, *on motion and notice* to the adverse party, the *defendant* may require him to show why they should not be consolidated. If it appears that, *at the time the motion is made,* the *actions could have been joined* and if the court, or a judge thereof, finds that they ought to be joined, they shall be consolidated."

The so-called order to consolidate that was entered in the Baldwin suit on January 20, 1925, after referring to Baldwin's petition and the petition of The Guardian Savings & Trust Company, continued as follows:

> "and it further appearing to the Court that it will be for the best interests of all the parties to this action and the action of The Guardian Savings and Trust Company,. Trustee, *versus* The Struthers Furnace Company, so to do, The Court, upon its own motion and for the purpose of the appointment of a receiver to do the things for which prayers are made in the petitions filed in these cases, hereby consolidates the case of The Guardian Savings & Trust Company, Trustee, *versus* The Struthers Furnace Company No. 56103, with this case in so far as the questions of the appointment and acts and duties of a receiver are common to both the last mentioned case and the case now being considered by this Court."

It will be observed:

1. That there was no motion made by *either* defendant in the Baldwin case, or by the defendant in the foreclosure case.

2. That there was no notice given.

3. That the two actions could not have been joined.

4. That consequently the court could not of its own motion consolidate them.

However, let us look at the order of consolidation a little more closely. The court consolidated the two actions for the purpose of the appointment of a receiver to take possession of the corporate assets, but only "*in so far* as the questions of the *appointment* and *acts* and *duties* of a receiver are *common* to *both*" cases. The only acts and duties that could be *common to both cases,* would be the taking of possession of the *mortgaged* property and preserving it. It follows, therefore, that the *consolidated action* is no broader than the action for foreclosure, so far as the acts and duties of the receiver are concerned. And, as we shall hereafter show, a receiver in a simple foreclosure proceeding cannot maintain a suit such as Grant, as receiver, is here seeking to maintain against Leach & Company.

Even if a receiver had been properly appointed in the Baldwin case he would have only the powers specified in section 11897. He would not have title to the corporate assets.

However, we respectfully insist that in determining Grant's power to maintain this suit, all proceedings in the Baldwin suit must be disregarded.

## II.

**All that petitioner in the foreclosure suit showed was that default had been made in the payment of interest, and that the trust deed provided for the appointment of a receiver in such case. There was no showing that the mortgaged property was in danger of being lost, removed or materially injured or that it was probably insufficient to discharge the mortgage debt, or that the defendant corporation had been dissolved, or that it was insolvent, or that it was imminent danger of insolvency, as required by Section 11894 of the General Code.**

**It follows, therefore, that the appointment of Grant as receiver was contrary to statute and void.**

For section 11894 of the General Code, which expressly specifies in what cases receivers may be appointed, see p. ii, *infra.*

A case precisely in point is that of

*Baker* v. *Varney* (Cal.), 62 Pac. 100,

the syllabus of which is as follows:

> "1. Code Civ. Proc. § 564, subd. 2, gives the court in an action to foreclose a mortgage power to appoint a receiver where the mortgaged property is in danger of being lost, removed, or materially injured, or the conditions of the mortgage have not been performed, and the property is probably insufficient to discharge mortgage debt. *Held,* that where, in an action to foreclose a mortgage, none of the reasons for the appointment of a receiver specified by section 564 existed, and the receiver was appointed under a stipulation in the mortgage, such appointment was void, since the parties could not stipulate so as to confer jurisdiction where none existed by law.
>
> "2. Where a receiver appointed to collect the rents and profits of mortgaged property pending foreclosure brought an action to recover possession of certain cattle claimed by him to be part of the rents and profits of the mortgaged property, the defendant might show in such action that the ap-

pointment was void on the ground that the court had no jurisdiction to make such appointment."

The "usages of equity" are also opposed to the appointment of Grant as receiver. In

1 Tardy's Smith on Receivers (2nd ed.), p. 34 *et seq.*,

it is said:

"The appointment of a receiver, on account of the serious consequences arising from an improvident exercise of this power, is hedged with all of the rules formulated by courts of equity as guides in the exercise of the powers which must necessarily be inherent in a court of equity. The similarity of the appeals to the conscience of the court in cases of receiverships and of injunctions has made applicable many of the well known rules which apply to cases in which injunction is sought. As has been already suggested, the principal purpose of a receivership is to preserve and protect the property which is the subject of the litigation for the benefit of the party who will be ultimately found by the court to be entitled to it, and the receiver is merely a ministerial officer of the court holding the property in trust for that purpose. Such being the main purpose of the remedy, it naturally follows that, in order to warrant the appointment of a receiver over property or a fund in litigation, there must be a showing of a danger that it may become lost, materially injured, or destroyed before the termination of such litigation. So, also, if it be shown that the property in litigation is in danger of being removed beyond the jurisdiction of the court, it is a sufficient ground for the appointment under the general rules applicable to the subject and also under the statutory provisions prevailing in most of the states, which are generally mere codifications of the chancery rules."

The author then goes on to state several other requirements which the petition in the foreclosure suit utterly fails to meet.

## III.

**In a simple foreclosure proceedings the power of a court to appoint a receiver is necessarily limited to the appointment of a receiver for the mortgaged property.**

**The alleged claim of The Struthers Furnace Company against Leach & Company under the contract of April 15, 1922, pursuant to which the bonds secured by the mortgage sought to be foreclosed were sold, necessarily was not a part of the mortgaged property.**

**The State Court was therefore without jurisdiction to direct the receiver to sue Leach & Company on the alleged claim.**

In

1 Tardy's Smith on Receivers (2nd ed.), p. 577,

it is said:

> "The general rule of course is that the receivership can extend only to the property covered by the mortgage. But it might happen that the mortgaged property is so situated with reference to other property that the receiver can not effectively take possession of the former without also controlling the latter. In such a case the receiver's possession is extended over the entirety and the court makes proper provision for protecting the rights of the owners of the property not covered by the mortgage."

And again on p. 622:

> "In a foreclosure action, as in any other action, the jurisdiction of the court is limited to the issues raised by the proceeding; it can not permit nor compel parties not directly interested in those issues to be brought before it nor permit nor compel its receivers to take possession of property which is not the subject matter of the litigation."

And again:

> "Since the purpose of the receivership is to preserve the property involved in the action and hold it ready for distribution in accordance with the final

> decree of the court, in a foreclosure action, the receiver can be placed in possession only of the property covered by the mortgage and it is error for the court to direct the receiver to take possession of property not so covered." (p. 625)

It is clear that the alleged claim of The Struthers Furnace Company against Leach & Company could not possibly prevent effective possession of the mortgaged property by the receiver.

In

*Scott* v. *Farmers' Loan & Trust Co.* (C. C. A. 8th Cir.) 69 Fed. 17, 20,

Judges Caldwell, Sanborn and Thayer sitting—Opinion by Caldwell, Cir. Judge,—it is said:

> "When a bill is filed to foreclose a mortgage, the court may, upon a proper showing, appoint a receiver to take into his possession and control the mortgaged property. But the jurisdiction possessed by a court of chancery to foreclose a mortgage and to appoint a receiver for the mortgaged property pending the foreclosure gives it no jurisdiction or power to seize or take into its custody or control, through a receiver or otherwise, property of the debtor which is not covered by the mortgage. Nor can the court in such a suit rightfully make any order that will prevent, hinder, or delay the other creditors of the mortgagor from subjecting the property not included in the mortgage to the payment of their debts. A mortgagee has the undoubted right to subject the mortgaged property to the payment of the mortgage debt, to the exclusion of all general creditors of the mortgagor and persons holding junior liens thereon; but as to all property of the debtor not included in the mortgage the mortgagee is in no better plight than if he had no mortgage."

In

*Bowman* v. *Hazen* (Kan.) 77 Pac. 589, 595,

in a case where an order of the lower court was collaterally attacked, the Court said:

"The findings disclose that, in the action in which the receiver was appointed, nothing was involved but the title of lot No. 165, on Kansas avenue, in the city of Topeka. The title of Branner, who was Hazen's grantor, to one-half of the lot, was not disputed, and the only controversy was whether Josie Webb and Millie Nichols owned the remaining half, and that part they ultimately recovered. In that case the decision in the trial court had been given in their favor, and they had acquired possession of their shares in the lot when the receiver was appointed. The trial court undertook to vest the receiver with the custody of other valuable property which was in no way involved in the action wherein the appointment was made. Just why the receiver was given possession of Branner's half of lot No. 165, when his right to it was conceded, is not easily understood; but, when the court undertook to reach out and take custody and control of property which was not the subject matter of the controversy, it went outside of its appointed sphere, and its orders in respect to such property were nullities. The court had no more authority over that property than it would have had over the square on which the statehouse stands. The fact that the other real estate, which may be termed the outside property, was or had been in litigation between the same parties, did not enlarge the court's jurisdiction in the case in which the receiver was appointed. The outside property was entirely distinct from that involved in the action wherein the receiver was appointed, and the orders of the court as to the former were in excess of its jurisdiction, and to that extent, at least, absolutely void.

This question was directly adjudicated, first in the Court of Appeals, and later when the decision of that tribunal was affirmed in this court. *Branner* v. *Webb,* 10 Kan. App. 217, 63 Pac. 274; *Webb* v. *Branner* (Kan. Sup. 68 Pac. 1133. Since that determination there has been no excuse for contention as to the invalidity of the receiver-

ship, so far as the outside property was concerned. The orders appointing and directing the receivers were incurably void, and afforded no protection to the receivers, or those at whose instigation they were acting. Some of the money wrongfully taken from Branner through the medium of the receivership was returned to him by order of court, and because of this it is contended that Branner and his grantee cannot raise the question of invalidity, and that Hazen is precluded from recovering in this action. The money returned to Branner was his own, and at no time did he or Hazen acknowledge the authority of the receiver, or acquiesce in his action. They protested persistently and at every stage of the proceedings that there was no jurisdiction to appoint the receivers, and that their acts were utterly void.

As the orders were nullities, they may be attacked collaterally, as well as directly, at any time, by anybody, and in any proceeding where their validity is in issue. *In re Dill,* 32 Kan. 691, 5 Pac. 39, 49 Am. Rep. 505; *Gille* v. *Emmons,* 58 Kan. 118, 48 Pac. 569, 62 Am. St. Rep. 609; *Whitmore* v. *Stewart,* 61 Kan. 254, 59 Pac. 261; *Johnson* v. *Powers,* 21 Neb. 292, 32 N. W. 62; *State* v. *District Court,* 21 Mont. 155, 53 Pac. 272, 69 Am. St. Rep. 645; *People* v. *Weigley,* 155 Ill. 491, 40 N. E. 300; *Smith* v. *Los Angeles & P. R. R. Co.* 98 Cal. 210, 33 Pac. 53; *Staples* v. *May,* 87 Cal. 178, 25 Pac. 346; *Kreling* v. *Kreling,* 118 Cal. 421, 50 Pac. 549; *People ex rel. Railway Co.* v. *Judge,* 31 Mich. 456; *People ex rel. Railway Co.* v. *Jones,* 33 Mich. 303; *Spoors* v. *Coen,* 44 Ohio St. 497, 9 N. E. 132; *Thurber* v. *Miller,* 11 S. D. 124, 75 N. W. 900; *Vila* v. *Grand Island Electric, etc., Co.* (Neb.) 94 N. W. 136, 63 L. R. A. 791; *Van Fleet's Collateral Attack,* § 16; 17 Encyc. of Pl. & Pr. 752.

The orders did not give the receivers even color of authority as to the property not in litigation, and they were therefore trespassers, and are liable for all the moneys unlawfully collected. The plaintiffs in that action, who procured their appointment and aided and co-operated with them in wrongfully taking and appropriating the rents from the outside

property, are equally liable, as trespassers, for the wrong done.

It is contended that they should be credited with the disbursements made — especially as much of it was used for the benefit of the owners. Trespassers are not in a position to make such a claim. Those who wrongfully seize and hold the property of another cannot excuse themselves by showing that it was subsequently used for some good purpose, or that the use made of it was, to some extent, beneficial to the wronged party. Such trespassers cannot compulsorily constitute themselves disbursing agents of the one whose funds or property they have wrongfully seized, nor can they make themselves his debtor by paying his debts without his request or consent. It cannot be said that the measure and extent of recovery adjudged by the trial court was erroneous. As tending to sustain the ruling, the following cases are cited: *Shaw* v. *Rowland*, 32 Kan. 154, 4 Pac. 146; *Hagar* v. *Haas*, 66 Kan. 333, 71 Pac. 822; *Otis* v. *Jones*, 21 Wend. 394; *Higgins* v. *Whitney*, 24 Wend. 379; *Kerr* v. *Mount*, 28 N. Y. 659; *Wehle* v. *Butler*, 61 N. Y. 245; *Roff* v. *Duane*, 27 Cal. 565; *Olsen* v. *Upsahl*, 69 Ill. 273; *Garrigan* v. *Knight*, 47 Iowa, 525; *Hall* v. *Ray*, 40 Vt. 576, 94 Am. Dec. 440."

See also:

*Staples* v. *May* (Cal.), 25 Pac. 346.

*State ex rel. Johnston* v. *District Court* (Mont.), 53 Pac. 272.

The subject matter of the foreclosure suit was the property covered by the mortgage and none other. The mortgage did not cover all the property owned by the corporation. The mortgage itself, according to the petition of the trustee, provided among other things as follows:

"There is not included hereunder any corporate stocks owned by the company, nor any mined ore, coal, coke, supplies, manufactured iron, cash ac-

counts, bills receivable or current assets, all being expressly excluded herefrom." (Tr. 245.)

There is no allegation that any of the above described property was thereafter conveyed to the trustee, or that the trustee, at the time the petition was filed, claimed that any of such property was subject to the trust deed. The court, however, undertook to appoint a receiver for all the property of The Struthers Furnace Company. (Tr. 252.)

As theretofore stated, the alleged claim against Leach & Company was not, and, of necessity, could not be covered by the trust deed. Of course, the alleged claim was not mentioned in the trust deed, and there is no general language under which the alleged claim could be subsumed. The bonds were issued and the mortgage was executed pursuant to the alleged *ultra vires* contract of April 15, 1922, and it would be absurd to say that any party to the transaction intended to include in the trust deed an alleged claim against Leach & Company of which no one was aware.

It therefore follows that if the direction of the court to sue is tantamount to a seizure of property not covered by the mortgage—namely, the alleged claim against Leach & Company,—then the direction to sue is void. If, on the other hand, the order appointing the receiver is construed as a seizure of such property, the order is void so far as the property in question is concerned.

The title to this claim was undisturbed by the appointment of a receiver. It still rested in The Struthers Furnace Company. There was no assignment of it to the receiver.

The jurisdiction of the court to direct its receiver to

sue was necessarily limited by the nature of the proceedings. The court could not by means of a mere direction to sue vest the title to this claim in the receiver. It was no part of the mortgaged property. Such a suit would be entirely foreign to the purpose of the foreclosure proceeding. The plaintiff in the foreclosure proceeding would not be entitled to any part of the amount realized in the suit against Leach & Company. It would belong to The Struthers Furnace Company.

The direction to sue was absolutely void; at least it did not vest the title to such claim in the receiver.

See cases cited on pp. 36-7, *infra*. In these cases the court appointing the receiver had directed him to sue —but there, as here, the order was void.

## IV.

**The rights of neither creditors nor stockholders were involved or could be involved in the foreclosure suit; consequently the prosecution of any suit against Leach & Company is wholly foreign to and inconsistent with not only the foreclosure suit, but the receiver's possession of the mortgaged assets. A receivership in foreclosure proceedings is entirely different from a receivership for winding up a corporation or in other suits which require liquidation of a corporation's assets.**

The foregoing principles are elementary and need not be elaborated on. In 19 Ruling Case Law, Section 327, page 525, it is said:

> "One of the leading purposes of a suit to foreclosure a mortgage is to secure such a decree as will enable the plaintiff to sell all the right and title that his mortgage covers, and enable a purchaser at the sale to ascertain what title it is that he buys. To attain this end it is usually necessary that all the claims held against the mortgaged premises should be adjusted. Ordinarily, therefore, all persons who are beneficially interested, either in the estate mortgaged or the demand secured, are proper parties to a suit to foreclose. This rule, generally will only embrace the mortgagor and the mortgagee, and those who have acquired rights or interests under them in the mortgagor's estate; for these are the only persons having any rights or obligations growing out of the mortgage, or interested in any manner in the subject matter of the action."

and again on page 536:

> "It is well settled that in foreclosure proceedings in equity unsecured contract creditors, having no judgment or other lien on the real estate, cannot intervene."

For the distinction between foreclosure proceedings and proceedings for winding up a corporation, see

*Commonwealth Trust Co.* v. *Salem Light, Heat & Power Co.*, 77 N. H. 146, 89 Atl. 452.

Neither the stockholders nor general creditors had any interest in or claim to or lien upon the mortgaged assets, and any cause of action which might be worked out through the corporation against Leach & Company for their benefit is wholly foreign to the foreclosure suit. A foreclosure suit is, of course, a proceeding *in rem*.

And yet Grant as receiver asked for leave to sue Leach & Company "for the benefit of the stockholders and creditors" and the court granted leave on the ground that

> "it is for the best interest of the creditors and stockholders of the company that such action be commenced."! (Tr. 264.)

## V.

**Grant was at most a mere custodian of certain corporate property. Section 11897 of the General Code does not vest him with title, and the order appointing him receiver did not even attempt to do so, but gave him possession only.**

**Since Grant was without title, the mere direction of the State Court that he bring suit against Leach & Company in a foreign jurisdiction conferred no authority in the premises.**

**The Federal Court in which the suit was brought was a foreign jurisdiction within the firmly settled rule above stated, and under the decisions of this Court, such court was without jurisdiction to entertain the aforesaid suit.**

Grant's powers were only those specified in section 11897 of the General Code of Ohio (pp. 12-14, *supra*). As heretofore shown, Grant was a mere custodian—a hand of the court—and was not vested with title to the property in his possession. He had only the powers of a chancery receiver.

The rule is settled beyond all controversy that such a receiver even though directed to do so by the appointing court cannot sue in a foreign jurisdiction. The law is succinctly expressed in the syllabus in

*Great Western Mining and Manufacturing Co.* v. *Harris,* 198 U. S. 561,

as follows:

> "A receiver is an officer of the court which appoints him, and in the absence of some conveyance or statute vesting the property of the debtor in him, he cannot sue in courts of a foreign jurisdiction upon the order of the court appointing him, to recover the property of the debtor. *Booth* v. *Clark,* 17 How. 338.

"A receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, as *every jurisdiction* in which it is sought by means of a receiver to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to control the distribution of the funds realized within its own jurisdiction.

"Where the receiver can not maintain an action to recover property in a jurisdiction other than that in which he was appointed, jurisdiction is not established because the action is authorized to be instituted by the receiver in the name of the corporation, if it appears that in case of a recovery the property would be turned over to the receiver to be by him administered under the order of the court appointing him."

See also:

*Sterrett* v. *Second Nat. Bank* (C. C. A. 6th Cir.) 346 Fed. 753. Affirmed 248 U. S. 73.

*Edwards* v. *National Window Glass Jobbers Assn.,* 139 Fed. 795.

*Fairview Fluor Spar & Lead Co.* v. *Ullrich,* (C. C. A. 7th Cir.) 192 Fed. 894.

*Booth* v. *Clark,* 17 How. 322.

*Hale* v. *Allison,* 188 U. S. 56.

*Fowler* v. *Osgood* (C. C. A. 8th Cir.) 141 Fed. 23.

Many other cases, both Federal and State, might be cited.

*Foreign* means *belonging to,* or *derived from another country or nation.* Obviously, a foreign court is a court created by another sovereign—for instance, one that derives its authority from a State different from that which created the court that appointed a receiver.

Federal Courts are wholly independent of State Courts. Although the Federal government and the several states exist within the same territorial limits, each is supreme within its own sphere. No state can enlarge or restrict the jurisdiction of a Federal Court. State Courts and Federal Courts are created by different sovereigns, by which alone they are maintained. No State Court can direct what a Federal Court shall or shall not do.

The fact that in this case both the State Court and the Federal Court sit in Ohio is, therefore, irrelevant and immaterial. The court that appointed Grant receiver was created by the Constitution and laws of the State of Ohio, whereas the court wherein the receiver brought suit, was created by laws enacted by Congress pursuant to the Federal Constitution. Their jurisdiction is different; the geographical territory in which they function is by no means identical; the tenure, qualifications and salaries of their judges are different; their judgments are reviewable by different courts, etc., etc. Each jurisdiction is foreign to the other to the same extent that each state is foreign to every other state.

That mere geographical location is irrelevant may be easily demonstrated. Can it be doubted that the Circuit Court of Appeals for the Sixth Judicial Circuit is a foreign jurisdiction to the Supreme Court of the State of Ohio? And yet both courts sit within the State of Ohio.

Of necessity a court must sit somewhere. But where it sits is unimportant. The Supreme Court of the United States sits only at Washington, D. C., but has jurisdiction of certain cases from the different Federal Districts, Alaska, the Philippines, Porto Rico, etc., etc. The decrees of no court operate throughout all space. This is true because there exist numerous independent sovereign

states or nations. The territory within which the decrees of a given court are effective never exceeds the territorial limits of the sovereign. As a rule the territorial jurisdiction of a given court is only a small portion of the territory governed by a sovereign. Consequently a jurisdiction is *foreign* to another jurisdiction, *whenever it exists under a different sovereign,* as in the case of any State Court in relation to a court created by another state (Illinois, Ohio, Texas, etc.), or *whenever its territorial jurisdiction is separate and distinct from that of the other,* as is the case of the different (federal) District Courts, even though they are created by the same sovereign, are members of the same judicial circuit and may sit within the same state.

As a rule the *territorial* jurisdiction of courts created by different sovereigns is separate and distinct. Supreme political power in a given territory usually means a triumphant victor over vanquished foes. Sovereignty is jealous of its prerogatives and does not brook on its own territory the presence of a rival. That is why, as a rule, wherever courts are created by different sovereigns, the territorial jurisdiction of each is separate and distinct.

But there may be a composition. Separate and distinct *territorial* jurisdiction is not essential to constitute one court foreign to another. For instance, the various courts imposed by Great Britain, the United States, France, Germany and other powers acting in concert upon China, Turkey and other nations. Is there any doubt that such international courts are *foreign* to the local courts?

If courts of different sovereigns sit within the same territory—if they are created and maintained under

laws that emanate from different sources—then they are as foreign to each other as are the courts of California and New York. Our dual form of government resulted from a composition. The sovereign states surrendered a portion of their powers. There was created and established another sovereign which is as distinct from and independent of the several states as any one of them is separate and distinct from and independent of any other. As heretofore stated, although the Federal government and the several states exist within the same territorial limits each is supreme within its own sphere. And those spheres in political and legal theory are as separate and distinct as if the territorial jurisdictions of these separate and independent sovereigns were separated by oceans. And the same is true of their respective courts.

The true rule is, that whenever a receiver brings suit either outside the territorial jurisdiction of the court that appointed him, or in a court that derives its authority from a source different from that of the court that appointed him, he sues in a *foreign* jurisdiction. This is true either because the sovereign that created the appointing court has limited the powers of such court, or because the court in which the receiver sues is independent of the sovereign that created the appointing court.

As said by the Supreme Court of the United States, the court in which the receiver sues is entitled to determine who shall be receiver, what shall be done with the funds collected, etc., etc. The receiver owes obedience to the court that appoints him. He cannot serve two masters. And where he is not vested with title to the assets of a corporation, direction to sue in an independent court confers no *authority* to sue. It is generally said that the receiver's authority is only co-extensive with that of the *court* appointing him, and that it cannot be

asserted beyond the territorial jurisdiction of such *court*. When the receiver in the case at bar sued in the District Court, he was *in* such court. He was in a *foreign jurisdiction. What authority has the Court of Common Pleas of Mahoning County in the District Court of the United States for the Northern District of Ohio?* And in the absence of *title to the assets* of The Struthers Furnace Company what standing or right of action has such receiver in the latter court?

It was created by a different sovereign; and when Grant entered that court he was in a foreign jurisdiction, as effectively as if he had entered the State of Indiana. The jurisdiction of the State Court ended where the jurisdiction of the Federal Court began.

The fact that both courts sit in Ohio is immaterial. Grant was merely an officer of the court that appointed him. Unquestionably, he sued in another jurisdiction—in a court that derived no authority whatever from the constitution or laws of the State of Ohio. And the reasons for the rule announced by the Supreme Court are equally applicable, regardless of whether the two courts sit in the same state.

*The Federal Court in which Grant sued had the right and power to determine for itself who the receiver should be.*

*Such court had the right and power to control the funds realized within its own jurisdiction.*

*And any sums recovered in such court would necessarily have to be turned over to the receiver to be by him administered under the court appointing him.*

The rule declared by the Supreme Court has not only

its origin, but its reason and justification in a *conflict of jurisdiction between distinct and independent courts.* A receiver who has no title may not sue in a foreign jurisdiction, not because he has crossed some geographical line, or is without the territorial jurisdiction of the court that appointed him, *but because he must seek the aid of a distinct and independent court that has not only the power but the duty to determine for itself who shall be appointed receiver, what shall be done with the property or funds realized, etc., etc.* Jurisdiction is refused, not because the receiver has no power outside the territorial jurisdiction of the court that appointed him, *for he may make contracts, accept payment of moneys due the estate, discharge an indebtedness of the estate, etc., etc., outside of such territorial jurisdiction.* Moreover, he is usually directed and authorized by the court that appointed him to sue in a foreign jurisdiction. The foreign court, however, *for reasons of policy,* refuses to permit the receiver to *exercise* the power granted by the appointing court. And of course the latter has no way of coercing the former. It is purely a case of *conflict of jurisdiction.* And that conflict exists in the case at bar to the same extent that it would exist if Grant had been appointed receiver by some court in Alabama or Wyoming.

Of course no such considerations apply where a receiver has *title.* In that case he sues not as an officer of the appointing court, but as of right by virtue of his title. Even this power is a creature of comity among nations. In the United States, however, it is a power protected by the Federal Constitution, where plaintiff is a citizen of one of the United States.

For the foregoing reasons we respectfully submit that the petition herein should be denied.

It is with considerable trepidation that we omit from our answer a brief discussion of the merits, particularly in view of the opinion that was rendered by the District Court, to which, of course, the petitioner has called attention. Why should the writ issue if in no event Grant, as receiver, could recover? . . .

As an antidote to the District Court's opinion which, we respectfully submit, is supported by neither the record nor the law, we have included in the appendix the merest outline of the essential facts and a few of the legal propositions upon which we relied in the courts below.

Respectfully submitted,

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## APPENDIX.

**(Taken from supplemental brief filed by counsel for Petitioner in Circuit Court of Appeals. The index consisted of only one page of which the following is a facsimile.)**

## INDEX.

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Argument:

I. The Receiver was Clothed With Authority to Bring this Suit and the Suit Itself is Rightly Based Upon the Pleadings in the Original Action in Connection With the Controlling Statutes of the State of Ohio, and Equitable Principles, and Such Authority is Rightly Incidental to and Consistent With the Nature and Purposes of His Possession of the Property and Assets of the Corporation, Which Passed to the Receiver ..... 5

I A. The Powers of the Receiver Under the Court's Order and the Authority of the Court to Make the Order to Pursue Leach and Company for the Recovery of the Bonds Secured by the Mortgage or for Re-imbursement for Bonds Already Disposed of by Leach and Company is Clearly Germaine to and Absolutely Necessary to the Determination of the Question of the Amount of Outstanding Bonds of this Company secured by Mortgage or in the Event of Their Previous Transfer to Bona Fide Purchasers to the Recovery and Payment to the Bondholders and, or, Creditors, and, or, Stockholders of the Corporation of the Equivalent of said Bonds in Money ..... 17

SEC. 11894. "APPOINTMENT OF RECEIVER. A receiver may be appointed by the supreme court or a judge thereof, the court of appeals, or a judge thereof in his district, the common pleas court or a judge thereof in his district, the common pleas court or a judge thereof in his district, or the probate court, in causes pending in such courts respectively, in the following cases:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed or materially injured;

2. In an action by a mortgagee, for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt;

3. After judgment, to carry the judgment into effect;

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment;

5. In the cases provided in this title, and by special statutes when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. In All other cases in which receivers heretofore have been appointed by the usages of equity."

SEC. 9064. "RECEIVER. When a line of railroad, the whole or part of which lies within this state, by

order of court, has been placed in the hands of a receiver, who has taken charge of and is operating it for the purpose of carrying passengers, freight, and doing such other things as ordinarily belong to the running and management of railroads, in his official capacity, such receiver may sue or be sued in the courts of this state without leave previously granted. No person shall act as such receiver unless he is a resident citizen of this state."

**THE FACTS.**

The proof shows that a bond issue was necessary (Defendant's Ex. "C", Tr. 127, 113, 29-30; Plaintiff's Ex. 14-A, Tr. 147-8). There was no evidence whatever of conspiracy. Leach & Company was approached twice by the president of The Struthers Furnace Company before an agreement for the sale of the bonds was reached (Tr. 82-4, 87-8, 135, 160-1, 177, 190-1, 193, 197). The written contract expressly provided that the bonds should be paid for in cash *and* preferred stock (Tr. 24-6).

Pursuant to the contract the properties of The Struthers Furnace Company were appraised by independent experts (Tr. 133-199, 90-4, 88-9, 181-5, 177-8, 94-7, 54-5, 173-5, 187-8). Leach & Company in reliance upon the appraisals, independent audits, and other data furnished by The Struthers Furnace Company exercised its option to take all the bonds. The preferred stock that was turned in at $85 a share then had a market value of $87.50 a share (Tr. 199-2). In addition to the 3,000 shares of preferred stock Leach & Company paid The Struthers Furnace Company $1,122,250 in cash.

As a result of the financing the current indebtedness of the company was funded, and as of December 31, 1921, it had a surplus of more than $1,000,000. (Tr. 187, 173-5.)

The bond issue was approved by both stockholders and directors (Tr. 61, 57-66, 67-75, 63, 73, 146-9, 69, 159, 148-9).

All legal matters were in charge of Messrs. Tolles, Hogsett, Ginn & Morley (Tr. 56-159, 71-198, 812).

The Struthers Furnace Company paid interest on all outstanding bonds until and including May 1, 1924, (Tr. 138).

More than three years after the transaction complained of, the receiver brought this anomalous suit. He tendered back to Leach & Company *not* the 3,000 shares of stock and the $1,122,250 in cash, but merely the stock!

Statute permitting corporations to redeem preferred stock:

"AN ACT

To amend section 8669 of the General Code, relating to common and preferred stock of private corporations.

*Be it enacted by the General Assembly of the State of Ohio:*

SECTION 1. That section 8669 of the General Code be amended to read as follows:

SEC. 8669. A corporation issuing both common and preferred stock may create designations, preferences, and voting powers, or restrictions or qualifications thereof, in the certificate of incorporation, and if desired, preferred stock may be made subject to redemption at not less than par, at a fixed time and price, to be expressed in the stock certificates thereof.

Preferred stock may also be redeemed in whole or part by purchase thereof by the corporation or by exchanging the same for common stock, or be con-

verted into common stock, upon such terms as from time to time may be proposed by the board of directors and accepted by the holders thereof. Preferred stock redeemed may be cancelled by the board of directors, and if so cancelled shall not be reissued. A certificate of such cancellation shall be filed with the secretary of state, as a certificate of reduction. Thereupon the authorized capital stock of such corporation shall be reduced by the amount stated in said certificate.

SECTION 2. That said original section 8669 be, and the same is hereby repealed." (107 Laws of Ohio, p. 411).

Only the second paragraph was new. The first paragraph (re-enacted) had been the law for several years.

## I.

**The Act of March 21, 1917, as amended, confers upon corporations issuing both common and preferred stock, in addition to their CONTRACTUAL rights to redeem, at a fixed time and price, preferred stock issued by them, the general STATUTORY POWER to purchase said preferred stock from such persons at such times and at such prices as they may be able so to do.**

**Such stock so purchased may be held by such corporations, and, like bonds, issued again.**

## II.

The general **STATUTORY POWER** conferred by the Act of March 21, 1917, upon corporations issuing both common and preferred stock to purchase preferred stock issued by them enters into and forms a part of the charters of all such corporations, whether copied into their certificates of incorporation or not.

It also enters into and forms a part of the contract between holders of preferred stock certificates and such corporations.

Stated in another way, this general **STATUTORY** power conferred by the new matter contained in section 8669 as amended is **IN ADDITION TO** the special **CONTRACTUAL** rights of such corporations authorized by the re-enacted original section 8668. All persons contracting with corporations are conclusively presumed to have knowledge of their powers. Therefore, it necessarily follows that the special **CONTRACTUAL** rights of corporations to redeem their preferred stock at the fixed times and prices expressed in said stock certificates **ARE SUBJECT TO THE EXERCISE BY SUCH CORPORATIONS OF THE GENERAL STATUTORY POWER** to purchase said stock at such times and prices as they may be able so to do. This, for the reason that such general Statutory power enters into and forms a part of the contract between such corporations and all holders of preferred stock.

## III.

Only by means of an unequivocal provision **EXPRESSLY EXCLUDING** the **STATUTORY** power of a corporation to reedem its preferred stock by purchase can such Statutory power be prevented from entering into and becoming a part of the contract between such corporations and the holders of its preferred stock.

Neither the resolutions authorizing said preferred stock, nor the stock certificates of The Struthers Furnace Company, contain any such provision, express or implied. They express and were intended to express only the **CONTRACTUAL** rights of the parties pursuant to the first paragraph of the Act of March 21, 1917, in contradistinction to the **STATUTORY POWER** of said corporation conferred by the second paragraph of said Act, which, as heretofore shown, entered into and formed a part of, not only the charter of said corporation, but its contract with holders of preferred stock.

## IV.

Even in the absence of the express power conferred by the Act of March 21, 1917, to purchase its preferred stock, The Struthers Furnace Company had the implied power to accept the 3,000 shares of preferred stock in controversy, pursuant to the contract of April 15, 1922, for the following reasons:

(a) They were received in good faith at less than their market value and at $20 a share less than the redemption price fixed in said stock certificates, not for the purpose of favoring Leach & Company, nor for the purpose of trafficking in its shares, but for the sole purpose of thereby avoiding great and possibly irreparable loss.

(b) There was no purchase of said shares. They were received as a mere incident to the exercise of the inherent, as well as the statutory power to borrow money, to issue its notes and bonds therefor and to secure payment of the same by mortgage. Having such powers, The Struthers Furnace Company had the power to agree upon the consideration to be paid for said bonds. And the said preferred stock was received by it merely as a part of the purchase price of said bonds.

As held by the Supreme Court of Ohio,

> "Acts of a corporation which, if standing alone, or engaged in as a business, would be beyond its implied powers, are not necessarily ultra vires when they are incidental to, or form a part of, an entire transaction, that, in its general scope, is within the corporate purpose. The validity of such a transaction is to be determined from its general character considered as a whole, rather than by segregation into individual parts, and each regarded as distinct from the others."

This would also be true, even if there were a purchase of said bonds under the circumstances above stated.

(c) Unlike some other States, the State of Ohio has placed no restriction upon the price at which bonds of private corporations may be sold, although it has provided that railroad bonds shall not be sold at less than 75 per cent of their par value.

A sale of the $1,500,000 issue of bonds by The Struthers Furnace Company for only the $1,122,250 cash paid by Leach & Company would have been invulnerable to attack. The mere fact that Leach & Company also transferred 3,000 shares of preferred stock to The Struthers Furnace Company, of necessity could not and did not invalidate the transaction.

## V.

Aside from the considerations mentioned in Point IV, the court below was clearly wrong in holding that a portion of the bonds delivered to Leach & Company, pursuant to the contract of April 15, 1922, were unsupported by any consideration other than the 3,000 shares of preferred stock.

Even if the court below were right in so holding, the conclusions of law which he sought to deduce therefrom would by no means follow.

## VI.

Even if it be assumed that the contract of April 15, 1922, was ultra vires The Struthers Furnace Company, it is too plain for argument that said **COMPANY** is not entitled to rescind said contract or to obtain any other relief for the following reasons:

1. The contract has been completely performed by both parties.
2. The parties are in pari delicto.
3. The status quo ante cannot be restored; and it would be grossly inequitable to permit said company to keep the $1,122,250 in cash and tender back merely the preferred stock.
4. Leach & Company never agreed to pay **ALL** cash for the bonds. No new or better contract can now be made for said company.
5. The said company is estopped to assert that said contract is ultra vires.
6. The said company is guilty of laches.

And for equally valid reasons neither the **STOCKHOLDERS**, nor the **CREDITORS**, if any, nor the **BONDHOLDERS**, are in any better position.

## VII.

A court of equity will not permit Leach & Company to be mulcted of $312,375.00 for the benefit of the other persons who participated in the transaction complained of.

*Old Dominion Copper Mining and Smelting Co.* v. *Lewisohn*, 210 U. S., 206.

*Hanlon Millinery Co.* v. *Mississippi Valley Trust Co.* (Mo.), 158 S. W., 359.

*Advance Realty Co.* v. *Nichols* (Minn.) 148 N. W., 65.

*Little* v. *Garabrant*, 35 N. Y. S., 689.